JD–02—08
Atlantic City, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADAMAR OF NEW JERSEY, INC., d/b/a
TROPICANA CASINO & RESORT

Employer

and Case 4—RC—21334

INTERNATIONAL UNION, SECURITY, POLICE
AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Petitioner

Scott A. Brooks, Esq., of Detroit, Michigan,
for the Petitioner.
James A. Mills, Esq., of Cincinnati, Ohio,
for the Employer.

RECOMMENDED DECISION AND ORDER ON OJBECTIONS

PAUL BUXBAUM, Administrative Law Judge. Pursuant to the Notice of Hearing on Challenged Ballots and Objections to Election issued by the Regional Director on November 7, 2007,[1] a hearing was held before me in Philadelphia, Pennsylvania, on December 4 and 5. The election had been conducted on October 10. The tally of ballots showed 62 votes cast for the Petitioner, with 63 votes cast against that labor organization. There were eight challenged ballots. (Bd. Exh. 1(c).)

This matter originated with the filing of a petition by the Union on August 30, seeking certification as representative of a unit of full-time and regular part-time security officers employed by the Company at its Tropicana Casino & Resort facility in Atlantic City, New Jersey. (Bd. Exh. 1(a).) The election was conducted pursuant to a Stipulated Election Agreement entered into on September 7. (Bd. Exh. 1(b).) After the election, the Petitioner filed timely objections on October 17, alleging eight instances of objectionable conduct by the Employer. (Bd. Exh. 1(d).) Subsequent to conducting her preliminary investigation, the Regional Director determined that a hearing was warranted. (Bd. Exh. 1(e).)

At the outset, I note that the parties have narrowed the issues before me. The Union withdrew Objection 6 during the Regional Director's investigation. (Bd. Exh. 1(e) at fn. 1.) In the course of the hearing, counsel for the Union moved to withdraw Objection 3. This motion

[1] All dates are in 2007, unless otherwise indicated.

was unopposed, and I granted it. (Tr. 175.) In addition, the parties reached agreement as to the disposition of the eight challenged ballots. They agreed that the Board agent's challenges to all of those ballots should be sustained.[2] (Bd. Exh. 2; Tr. 7-8.) The proper disposition of Petitioner's Objections 1, 2, 4, 5, 7, and 8 remain to be determined.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Petitioner and the Employer, I make the following

Findings of Fact

A. The Events at Issue

Adamar of New Jersey, Inc., owns and operates the Tropicana Casino & Resort, a large property located on the Boardwalk of Atlantic City. In turn, Adamar is owned by Columbia Sussex Corporation. The casino includes gaming facilities, a hotel, and various retail establishments. It employs 3600 people, 130 to 135 of whom are security officers. It is these security officers that the Union seeks to represent. The officers work in three shifts: a day shift from 8 a.m. to 4 p.m.; a swing shift from 4 p.m. to midnight; and a grave shift from midnight to 8 a.m. Each of those shifts is supervised by a security shift manager. The managers on those respective shifts are Thomas Kelly, Aleisha Perez, and John Wilson. Overall supervision of the department is provided by Ronald Pisko, the casino's executive director of security. Although he had many years of past employment by the casino, he was newly appointed to this position approximately six weeks prior to the election.

The Union's organizing campaign was conducted by Steve Maritas, its director of organizing. He testified that it was his responsibility to "hold the meetings, write the literature, [and] design the whole campaign strategy and tactics." (Tr. 14.) During the period between the filing of the Union's petition and the date of the election, a portion of that strategy involved Maritas' solicitation of employees who were entering and leaving the casino through a designated employees' entrance.[4] A key allegation in this case involves the Company's response to this activity.

Maritas testified that he began to station himself at the casino entrance on September 30 and repeated this on approximately 6 days during the 2 weeks preceding the election. His practice was to arrive there about an hour before a shift change and remain in place until 15 minutes after that change. As the Company operated multiple shifts for security officers, Maritas made repeated visits on those days during which he solicited the employees at the building entrance. While at the entrance, he reported that he would encounter employees and "try to pass the [Union's] literature out and bumper stickers or T-shirts just to entice them into a conversation." (Tr. 18.) He also placed campaign signs near the doorway. His purpose was to engage in dialogue with the officers in order to "find out what their concerns were, or if they had

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[2] Those ballots were cast by Theodore Kingsland, Rabindra Paul, Imitaz Shah, Kami Sherman, Elizabeth Shuman, Columbus Stevens, Robert Swartz, and Tariq Zaman.

[3] While the transcript of the proceedings is generally accurate, a few errors require correction. At p. 10, l. 14, there was "no" issue as to jurisdiction. At p. 104, l. 22, the witness said that he did not "lie" to them. At p. 147, l. 5, counsel asked whether there was a "certain" entrance that could be used. At p. 184, l. 24, the witness was referring to the management "of" the Union. Any other errors are not significant or material.

[4] While there was no requirement that security officers use this entrance, there was uncontroverted testimony that "most" of them did so. (Tr. 147.)

any questions on the upcoming election." (Tr. 18.)

Maritas reported that on the first occasion that he engaged in this campaign activity, there were no supervisors positioned in the area when he arrived.[5] After about 10 to 15 minutes, he noticed that there were "a few gentlemen and a woman standing behind just watching me." (Tr. 18.) He identified two of those persons as Pisko and Perez.

Pisko confirmed that the Company's management first became aware of Maritas' presence at the entrance door when several security officers told him "that there was a stranger outside asking people if they were Security." (Tr. 94.) Pisko, accompanied by Perez and Wilson, went outside and, in Pisko's words,

> observed Mr. Maritas to see what he was doing. And he was engaging with people coming in towards this door and, in some cases . . . would come into this area right here shaking people's hands and greeting them.

(Tr. 94-95.)

All the witnesses agree that Pisko initiated a conversation with Maritas. Maritas testified that Pisko told him that he "could not stand where I was standing, that it was Tropicana's property." (Tr. 20.) Maritas disputed this assertion, stating, "I believe this is public access way." (Tr. 20.) He suggested that this dispute could be resolved by the Employer calling the police and seeking their intervention. Pisko confirmed this account, adding that he informed Maritas that he could station himself a short distance away on the sidewalk. He further testified that, when Maritas indicated that he was not going to move, Pisko told him, "[W]ell, you're going to have some company." (Tr. 95.) While Maritas denied that Pisko offered him any alternative location for his activities, both men agree that after this discussion about Maritas' activity, they engaged in a pleasant conversation about topics unrelated to the organizing campaign.

At the conclusion of this exchange between the two men, Pisko, accompanied by Wilson, eventually went back inside the casino. Perez remained outside in the area near the employees' entrance. Maritas testified that, "she was watching every move that I was making. She had the radio and she kept communicating with somebody."[6] (Tr. 24.) Significantly, he noted that Perez was "watching me talk to, you know, some of the employees that were either coming in or leaving at that point." (Tr. 25.) This is confirmed in the Employer's report of the incident, where it is noted that Maritas "continued to approach employees as they either arrived for work, or left after completing their shift." (Emp. Exh. 8.) I readily conclude that this information about Maritas' conduct was provided to the report writer by Perez.

This pattern of solicitation by Maritas and observation by the Employer's supervisors was regularly repeated during the days leading up to the election. Pisko testified that, although management believed that Maritas was trespassing, they decided not to call the police or

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[5] According to Maritas, this would have been on September 30. By contrast, Pisko testified that Maritas was first observed at the entrance on October 2. While resolution of this conflict is not particularly necessary, I note that Pisko's account is corroborated by an incident report documenting the first encounter between Maritas and Pisko. That account indicates that these events occurred on October 2. (Emp. Exh. 8.)

[6] In an indication of how near to him Perez had stationed herself, Maritas reported that he could overhear her conversations on that radio.

otherwise take action to remove him. Thus, Pisko confirmed that during Maritas' approximately 12 visits to the area immediately proximate to the employees' entrance, he was never again instructed to leave. When counsel for the Union asked Pisko if "the casino tolerated then Mr. Maritas' presence on its property [during] subsequent visits," he replied, "[t]hat's correct." (Tr. 114.) At the same time, Pisko instructed his supervisors to stand outside and observe Maritas each time he returned to the area of the doorway. Pisko conceded that this surveillance was conducted in such a manner that the employees, "could see the presence of a supervisor there in most cases, yes." (Tr. 116.) This was confirmed by Maritas, who noted that each time he presented himself at the entrance, supervisors would come outside, "[p]robably within three to five minutes" after his arrival.[7] (Tr. 36.)

During the period leading up to the election, the Employer also engaged in campaign activities in opposition to the organizing effort. Much of this consisted of the distribution of a variety of memoranda addressing the question of representation. Some of these included rather heated rhetoric. For example, on September 16, Pisko wrote a memo asserting that union officials "will say anything to get a piece of your paycheck." (Emp. Exh. 9, p. 4.) On September 24, the Company issued another communication to the security officers on the subject of, "Union Corruption." It urged the officers to vote against representation in order to "make sure that money from their paychecks is not stolen by union leaders." (Emp. Exh. 9, p. 11.) Two days later, the employees were given another memo about, "More Union Corruption." This missive criticized the Union's officials for "their disregard for the law and employee rights." (Emp. Exh. 9, p. 13.) Four days before the election, Pisko issued a document consisting of a series of questions and answers. In it, he contended that the Union had "nothing to offer but empty promises and a hand in your pocket." (Emp. Exh. 9, p. 23.)

Another aspect of the Employer's election campaign activity involved presentations made to the security officers during roll calls. The practice of conducting such roll calls preexisted the organizing effort. These meetings were held twice a week for each shift, beginning 15 minutes before the commencement of the shifts. Typically, 25 to 30 officers attended each roll call. Pisko reported that the purpose of these meetings was to "pass out information." (Tr. 176.) In the 2 to 3 weeks preceding the election, a frequent topic discussed by management during roll calls was the organizing campaign.

The Union presented the testimony of one security officer, Rose Tenuto, regarding the statements made at roll calls and a number of other issues involving alleged management misconduct during the period leading to the election. Tenuto reported that on several occasions during roll calls, Pisko told the assembled officers that, "if we went with the Union, negotiations would start with us having nothing. They wouldn't start from what we had presently." (Tr. 145.)

Tenuto also testified that other issues were discussed at the roll calls. She noted that officers who were opposed to the Union were vocal during these meetings. The most vocal union opponent, Officer Maggie Walters, asserted that, in the event of a union victory, "we would lose our vacation time, we would lose our personal days, we would lose our sick days." (Tr. 145.) She contended that, although Pisko and Perez were present when these statements were made, nobody from management ever disputed Walters' allegations. Tenuto also indicated that, during a roll call on October 6, Perez told the officers that, if they elected to be represented by the Union, "the Union would have no control on scheduling, that would still be

[7] Maritas indicated that an exception to this pattern occurred on one occasion. On that day, when Maritas arrived at about 7:10 a.m., two supervisors, Pisko and Kelly, were already standing outside.

up to Tropicana." (Tr. 146.)

The Employer offered documents and the testimony of various witnesses in an effort to explain and rebut Tenuto's claims that supervisors improperly characterized the possible effects of the selection of the Union by suggesting that it could result in the unilateral loss of wages or benefits because negotiations for a contract would start from "nothing," and that the Union would have no say on the issue of scheduling. Similarly, the Employer presented evidence disputing Tenuto's testimony regarding management's alleged failure to respond to remarks from Walters concerning the possible loss of leave days.

Pisko testified that his actual reference to the manner in which collective bargaining would occur was,

> [t]hat we started with a blank contract and everything was negotiable, and they could either stay the same, they could lose, or they could win.

(Tr. 183.) I note that Pisko's account of his statements in this regard is corroborated by the Employer's very similar written communications to the security officers on this topic. In a memo dated September 20, the officers were told by Pisko that, "the Company would be completely free to propose that your wages and benefits increase, decrease or stay the same." (Emp. Exh. 9, p. 9.) In another memo dated October 5, Pisko observed that, "in collective bargaining it is possible that you could lose benefits that you now have because everything is negotiable." (Emp. Exh. 9, p. 21.) Both of these communications link any change in wages or benefits to the bargaining process where the parties "propose" terms and conditions of employment that will be "negotiable."

Pisko also testified regarding statements during roll calls concerning the role of the Union in determining employee work schedules. He specifically denied telling his employees that, if they voted for representation, the Union would have no say on the issue of scheduling. Instead, he explained that the Employer had obtained a copy of a collective-bargaining agreement between the Union and a casino in Nevada. During roll call discussions, he did cite that agreement's provision granting that company wide latitude in making scheduling decisions.[8] Supervisors Kelly and Perez also testified that they never told unit members that the Union would have no control over scheduling. Kelly reported that, like Pisko, he did make reference to the Nevada agreement, showing it to various security officers.

Regarding Tenuto's contention that management officials failed to rebut an employee's claim that, in the event of a union victory, the officers would lose their current vacation and sick leave benefits, the Company contended that this issue only arose during presentations by its executive director of human resources, Rose Tartaglio. Tartaglio testified that she made presentations during two roll calls. At the first session, an officer told her that there was a rumor that the Employer was going to "take away some vacation and sick time as of January 1st of 2008." (214.) Tartaglio reported that she told the assembled employees that she was unaware

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[8] Once again, the Employer provided a measure of corroboration by introducing this collective-bargaining agreement into evidence. The management rights provision in that contract affords management the right to determine the number of employees "assigned to any particular shift, the assignment of duties thereto, and the right to change, increase or reduce the same," as well as, the rights to "scheduling" and "assigning" of security officers. (Emp. Exh. 10, p. 4.)

of any such action. Because of this question during the first meeting, during her second session she raised the issue herself, telling the officers that "it was simply a rumor." (Tr. 214.) Tartaglio's testimony was supported by that of Pisko, Perez, and Kelly.

Obviously, I must resolve the differences between the accounts of Tenuto and the Employer's various supervisors regarding what transpired during roll call sessions. In so doing, I begin by noting that Tenuto's testimony was entirely uncorroborated while the Employer presented multiple witnesses and some supporting documentation. Furthermore, the Employer's witnesses offered accounts that were persuasively consistent. In contrast, Tenuto, while striking me as sincere, was a somewhat tentative, hesitant, and vague witness.[9] Finally, I note that much of the dispute in testimony on this subject was really a difference in interpretation. Tenuto's conclusion that the statements were rendered in an objectionable manner is simply less convincing that the Employer's explanation establishing that, in context, the statements were simply permissible campaign rhetoric. I will discuss my reasoning for reaching this conclusion in detail during the portion of this decision devoted to legal analysis.

Finally, Tenuto raised another roll call issue that caused her acute discomfort. During the October 6 session, Walters attempted to provoke a debate about the Union, chiding Tenuto by telling her to, "tell your side . . . if you have a product, you want to try to sell it." (Tr. 204.) Perez testified that this attempt to provoke debate was squelched by Pisko who intervened to halt Walters' efforts. He stated that he "didn't want to put the officers against each other." (Tr. 204.)

There is no doubt that this incident upset Tenuto. A couple of hours later, while Tenuto was performing her duties, Perez approached her. As Tenuto recounted, Perez,

> came to me to apologize for what happened. And she said, well, you are the face of the Union, and let me know if you have any other problems.

(Tr. 151.) Under examination by counsel for the Employer, Tenuto agreed that Perez told her that, regardless of the differing opinions on the union issue, she wanted everyone to be able to work together.

Perez also described her conversation with Tenuto. She agreed that she approached Tenuto after the events of the roll call. When she asked how Tenuto was doing, Tenuto "either said how did I become the face of the Union or why have I become the face of the Union[?]" (Tr. 205.) Perez emphasized that, while she may have repeated this expression regarding the face of the Union, it was originally Tenuto's choice of wording. Perez reported that she told Tenuto that she did not want division among the officers. The conversation then turned to other topics unrelated to the election campaign.

Once again, I conclude that Tenuto's interpretation of these events is less reliable than that offered by Perez. There is no disagreement that the ostensible purpose for Perez to have

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[9] As an example, when Tenuto was asked when she encountered Maritas at the employees' entrance, she responded, "Now let me think a minute. The election was Wednesday. I'm trying to remember. I'm off Monday. It couldn't have been Tuesday. I really don't remember." (Tr. 148.) See also her similar struggle with details at pp. 160—163, including her frustrated admission that, "Oh, I don't remember the dates." (Tr. 161.) As this illustrates, she was an earnest witness, but was unable to present a clear and detailed account.

raised the issue with Tenuto was to reassure her. Nothing in her demeanor caused me to conclude that Perez had twisted this benign purpose into a sinister attempt to intimidate Tenuto by suggesting that the Employer viewed her as the embodiment of the Union's campaign.

As the date of the election neared, emotions flared. This led to a rather dramatic confrontation on October 8. That afternoon, Maritas was in his customary position by the employees' doorway. On this occasion, he was passing out a flyer that he had prepared. The flyer was designed to imitate the style and appearance of Pisko's series of memos to unit members discussing campaign issues. Thus, it purported to be a memo from Pisko to the security officers regarding matters of leave, insurance, wages, and layoffs. It was dated October 11, the day after the upcoming election. In the memo, Pisko is depicted as telling his employees that, although he had sincerely promised to take care of them if they rejected the Union, his desires had been overruled by higher management.[10] As a result, the memo had Pisko announcing a series of onerous management actions, including a 50 percent increase in health insurance co-share costs, a reduction in health benefits, the eliminating of "all present sick days and personal days you now enjoy," the layoff of approximately one-third of the security employees, and the decision not to approve raises for the majority of the remaining security officers.[11] (Emp. Exh. 1.) The bottom of this one-page document contained the following exhortation and disclaimer:

> **IS THIS YOUR FUTURE?** ***Vote YES on Wednesday[,] October 10, 2007. This document was prepared by the International Union Security, Police and Fire Professionals of America (SPFPA) and not by Ron Pisko.***

(Emp. Exh. 1.) [Italics and boldface in the original.] Among the persons given the flyer by Maritas was a security officer who was known as a management supporter.

Pisko testified that, shortly before the final preelection roll call for the swing shift, he was given a copy of Maritas' flyer by a security officer and found a second copy that had been placed on his desk. He proceeded to the roll call, where he told the assembled officers that, "this was filled with a bunch of lies, it was a forged document." (Tr. 102.) He then proceeded to publicly "rip it up." (Tr. 102.) Kelly confirmed that Pisko ripped up the flyer in the presence of the Company's president and "some security officers." (Tr. 136.)

Shortly after the roll call, Pisko decided to confront Maritas about the flyer. Accompanied by Kelly, he proceeded to the area beside the employees' entrance. He accused

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[10] I infer that this flyer was designed by Maritas as a response to an undated memo to the employees from Pisko in which he stated, "My promise to you is I will give 110% to make this a better department and a better place to work. During the past few weeks I have asked you numerous times to trust me, and to give me a chance." (Emp. Exh. 9, p. 25.) The Union does not raise this language as an instance of objectionable conduct. As a result, it is unnecessary to assess it in light of the Board's standards for pleas seeking forbearance made by new managers. See my discussion adopted by the Board in *Superior Emerald Park Landfill, LLC,* 340 NLRB 449, 459-460 (2003).

[11] It was obvious to me from the content of the flyer that it was written in a tongue-in-cheek style. For instance, it informed the employees that the large layoff would "NOT be done by seniority but rather by favoritism." (Emp. Exh. 1.) [Capitalization in the original.] This, coupled with the purported elimination of all sick and vacation leave, made it evident that it was not a serious attempt to imitate a communication from the Employer.

Maritas of being "a liar and a forger." (Tr. 41.) Maritas testified that Pisko was "very pissed off" and that, "it got so bad that we was, both of us, was screaming at the top of our lungs." (Tr. 41.) In response to Pisko's claim that his name had been "fraudulently" placed on the flyer, Maritas rejoined that, "it's a flyer, propaganda, but I clearly disclaimed it showing that you did not prepare it, it was prepared by me." (Tr. 42.) Maritas also reported that, during this incident, a large number of employees were present. One of them asked him if the flyer had been written by Pisko or himself. He pointed to the disclaimer and told her, "[h]ere's my name, here it is right there." (Tr. 42.)

Maritas testified that Pisko and Kelly were accompanied by a third supervisor whom he identified as Wilson.[12] According to Maritas, Wilson took one of the flyers from an employee and "started ripping it up saying this was toilet paper." (Tr. 45.) He then proceeded to take other flyers from employees and rip them up as well. Maritas continued his description of this rather dramatic behavior as follows:

> [I]t wasn't just one person. He took it and ripped it up and this is toilet paper. And he'd get another one, this is toilet paper, and I was just, you know[,] watching it as it happened . . . . He did it twice . . . I think he had actually ripped one of mine up too. So it was two from an employee and then I said, you want mine? And he took it and ripped it up.

(Tr. 45-46.) After this, Maritas and several of the employees departed. Maritas returned later that night to resume his activities.

Both Pisko and Kelly testified regarding this angry dispute. Pisko agreed that he showed Maritas the flyer and told him that it was "bullshit, this is lies." (Tr. 104.) When he also called it a forgery, Maritas responded by pointing out the disclaimer at the bottom. Pisko testified that there were "five or six" security officers present, several of whom he identified by name. He also reported that nobody ripped up any flyers during this incident. Finally, Pisko strongly denied that Wilson was present, pointing out that Wilson did not work on October 8 and was not at the casino at all that day.

Kelly reported that he and Pisko were the only supervisors present during the confrontation with Maritas. In particular, he denied that Wilson was involved in any way. He agreed that several unit employees did witness the event, and he named two of those persons. Finally, he denied that anyone ripped up any flyers. The Employer also presented the testimony of Wilson who confirmed that he was not at the casino on October 8, did not witness any confrontation between Pisko and Maritas, and did not rip up any flyers. His testimony was strongly corroborated by his attendance record. That document showed that he worked on October 7 and 9, but not on the date in question. (Emp. Exh. 11.)

It is necessary to resolve the discrepancies in the two versions of this incident. There is

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[12] To be precise, Maritas identified the alleged third supervisor as the man wearing a light colored shirt in a cell phone photograph he had taken on another occasion. (Pet. Exh. 4.) Pisko confirmed that the man in that photograph was Wilson. There was no contradictory evidence and I certainly credit Pisko's ability to correctly identify one of his three shift supervisors. Therefore, I reject counsel for the Union's contention that Wilson was "never identified with certainty." (Pet. Br. at fn. 1.)

no dispute that Pisko initiated an angry exchange with Maritas. It is also undisputed that a number of security officers witnessed that exchange.[13] As to the matters that are in dispute, I find that Wilson was not present and did not rip up any flyers. I recognize that it is possible that some other unidentified supervisor or employee could have ripped up flyers during the incident. While this possibility cannot be excluded, there is insufficient reliable evidence to find that it actually happened. The contrary testimony of the supervisors was clear and consistent.

In contrast, Maritas' unsupported claim was undercut by the imprecision of his account. One could reasonably anticipate that Maritas' observations of events taking place around him during his screaming match with Pisko could be unclear. On the other hand, his claim that a supervisor took a flyer from his own hand in order to destroy it should be the subject of far more accurate and precise recollection. Despite this, the best that Maritas could offer was to claim that, "I think he had actually ripped one of mine up too." (Tr. 46.) This lack of certainty as to a matter on which one would reasonably expect such certainty renders his account less than trustworthy. For these reasons, I find that Pisko initiated an angry exchange with Maritas that was observed by roughly a half dozen security officers. I do not find that any other supervisor escalated the severity of the incident by destroying any flyers.

Considering the antipathy aroused by Maritas' flyer that was designed to warn unit members about the possible inability of Pisko to deliver on his promises, it is ironic that the Employer also issued a flyer on the same date concerning the same topic. Addressing the Union's statements to employees regarding the improvements in working conditions that could be achieved through representation, the Company warned, "Don't be misled by false promises. VOTE NO." (Emp. Exh. 9, p. 26.) [Underlining and capitalization in the original.] In addition, during the evening of October 8 and continuing on October 9, the Company distributed its response to Maritas' flyer. This strongly worded document characterized Maritas' missive as "a forgery [that] contained one lie after another." (Pet. Exh. 1.) It concluded as follows:

> It is obvious that no one can trust a liar and forger. It makes me wonder what documents he has sent out using your name. No one at the casino will ever trust the union or this individual. **Why should you? VOTE NO AGAINST LIES & FORGERY.**

(Pet. Exh. 1.) [Boldface, underlining, and capitalization in the original.] It was signed by Pisko, who testified that he distributed between 70 and 100 copies to bargaining unit members. One of those members gave Maritas a copy on October 9. Maritas reported that this was so shortly before the election that he was unable to prepare a response.

Also on the day before the election, October 9, Shift Manager Kelly engaged in campaigning directed toward Tenuto. The incident was precipitated when Tenuto reported for duty. She testified that, as she approached the employees' entrance, she encountered Maritas and Kelly standing in close proximity to each other. She did not stop to converse with either of

[13] There was disagreement about the number of bargaining unit members who witnessed the incident. Maritas claimed that approximately 30 employees were present. He was only able to provide one name, a female officer named Torres. Pisko testified that the Company did not employ any female officer by that name. Maritas' estimate of the crowd seems quite high. I credit Pisko's testimony that approximately a half dozen security officers saw these events. His testimony was reasonably consistent with that of Kelly and was bolstered by his ability to provide the names of four of these employees.

them. That evening, Kelly referred to this, advising Tenuto that he had noticed that she had not stopped to speak with Maritas and that he, "wanted me to know that I was free to do that." (Tr. 150.) Tenuto added that, during the course of this conversation, Kelly opined that, "if we did not vote for the Union, that Columbia Sussex would look favorably on our department." (Tr. 150—151.)

In his testimony, Kelly also described the content of his discussion with Tenuto. He confirmed that their conversation took place on October 9, noting that he "was hitting all the guards on the last night before the election." (Tr. 196.) He reported that he asked Tenuto whether she had seen Maritas' flyer and Pisko's rejoinder. He testified that he continued in the following manner:

> I said to her, . . . it would make the security department look good with a no vote, that the dealers just voted four to one for the UAW, and it would put Ron [Pisko] in good light on the fifth floor and [the Company's president] in good light with Columbia Sussex.

(Tr. 197.) He underscored his point, by elaborating that, "I said the fifth floor, meaning our executives right there at the Tropicana will look favorable upon the security department and Ron Pisko, if we won the election." (Tr. 198.) Significantly, Kelly was asked if he made this same argument about favorable consideration to other security officers and he unhesitatingly responded, "[s]ure." (Tr. 202.)

On the following day, the election was held. The Employer's position prevailed on the narrowest of possible margins, 63 to 62 votes. This litigation ensued.

B. Legal Analysis

In its objections, the Union alleges a number of specific instances of conduct by the Employer that it contends constituted unlawful activity that "improperly interfered with the conditions necessary for a fair election." (Bd. Exh. 1(d), p. 2.) Long ago, the Board explained that its statutory duty was to provide a "laboratory" in which to test "the uninhibited desires of the employees" regarding union representation. *General Shoe Corp.,* 77 NLRB 124 (1948), enf. 192 F.2d 504 (6th Cir. 1951), cert. denied 343 U.S. 904 (1952). If a party's misconduct "creates an atmosphere which renders improbable a free choice," the Board may invalidate the results of the election. Infra. In language that must have been dear to the heart of generations of law professors, judges, and litigators, it observed that, "[t]he question is one of degree." Infra.

As this would indicate, the key inquiry is whether the conduct that has been objected to "reasonably tended to interfere with the employees' free and uncoerced choice in the election." *Quest International,* 338 NLRB 856, 857 (2003). [Citation omitted.] In undertaking this analysis, the Board has cautioned that,

> [i]t is well settled that representation elections are not lightly set aside. Thus, there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees. Accordingly, the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. [Citations, internal quotation marks and other punctuation omitted for clarity.]

Safeway, Inc., 338 NLRB 525 (2002). The Board also holds that the test to be applied is an objective one. It is necessary that the adjudicator examine how a reasonable employee would react to the conduct that is at issue. In so doing, one must draw appropriate inferences and "prudently" apply lessons learned through the Board's experience in the field of labor relations. *Double J Services,* 347 NLRB No. 58, slip op. at 3 (2006). I will now examine the individual allegations of misconduct in descending order of importance and then evaluate the overall effect of the Employer's behavior on the employees' freedom of choice.

1. The Employer's surveillance

Without doubt, the Union's central allegation of objectionable conduct by the Employer was that,

> [d]uring the critical period, the Employer through its agents interfered with Petitioner's efforts to communicate with employees by engaging in surveillance of employees as they left the Employer's premises at the end of their work shifts and otherwise intimidated employees from speaking with Petitioner's representatives and taking literature proffered by Petitioner's representatives.

(Bd. Exh. 1(d), Objection 5.)

Interestingly, the facts are largely uncontroverted. During the two weeks immediately preceding the election, on approximately twelve separate occasions, Maritas stationed himself outside the employees' entrance during shift changes. His purpose in doing so was to introduce himself to bargaining unit members, engage them in discussion about representation, and provide them with campaign materials.

When Maritas arrived at his chosen station for the first time, there were no supervisors stationed in the vicinity. There was no evidence suggesting that the Employer maintained any prior practice of having supervisors or security officers placed at the employees' entrance for purposes of surveillance or for any other reason. Instead, the testimony demonstrated that the Company's subsequent surveillance practices outside that entrance were strictly a response to Maritas' organizing activities. Upon first learning of Maritas' presence at the employees' entrance, Pisko, accompanied by two other supervisors, approached him and instructed him to move to a sidewalk located at another area of the Employer's premises.[14] Maritas declined to obey this instruction, asserting that his chosen location appeared to be a public area. In response, Pisko said, "[W]ell, you're going to have some company." (Tr. 95.)

Pisko's prediction was entirely fulfilled by the Employer's subsequent pattern of behavior. From that moment forward, each time Maritas appeared at the entranceway, the Employer posted one or more of its security department supervisors nearby. The sole purpose for this newly-instituted surveillance was, in Pisko's words, "to witness [Maritas'] activity when he was back in the area on the days after." (Tr. 100.) This was confirmed by Kelly, who testified that, when Pisko gave him the surveillance assignment, he stated that "I was down

[14] On direct examination, Pisko, while conceding that members of the public were not barred from the area chosen by Maritas, contended that he directed Maritas to the other sidewalk because it was public property. However, under cross-examination, he confirmed that this alternate sidewalk was also owned by the casino. He observed that he directed Maritas to that sidewalk because, "that's where we allow the Union to conduct their business." (Tr. 111.)

there to observe Steve, to be down there for trespassing, solicitation on our property." (Tr. 128.) The close nature of the surveillance was illustrated by Maritas' uncontroverted description of Perez' behavior during the first episode of surveillance. He noted that she "was watching every move that I was making. She had the radio and she kept communicating with somebody." (Tr. 24.) At one point, Maritas stepped behind a pillar where Perez could not observe him. He overheard her speaking into the radio, saying, "I don't know where he is right now." (Tr. 25.) He reported that this incident occurred while employees were in the area.

At this juncture, it is appropriate to discuss the geography of the surveillance activity. Both parties provided useful photographic evidence of the area around the employees' entrance. Perhaps the clearest overall illustration of the confined space involved in the surveillance is Employer's Exhibit 2. It shows a small portion of the employees' doorway below and to the left of the large self-parking sign. More importantly, this view clearly demonstrates that the vicinity of that doorway is tightly bounded by a large concrete pillar, a second, smaller pillar, a solid wall, and the sidewalk and street. It is useful to compare this photo with a cell phone camera shot taken by Maritas. That view, Petitioner's Exhibit 4, shows Supervisors Wilson and Perez, as well as, a security officer. The supervisors are engaged in their surveillance activity while standing beside the solid wall and appear to be very close to Maritas' camera. Maritas testified that he was holding the camera at his customary location when he snapped the picture, probably on October 7.

The testimony confirmed that the Employer's surveillance was undertaken in very close quarters and in immediate proximity to Maritas' position. That testimony also established that the impact of this close surveillance was significant. For example, Tenuto reported that on one occasion as she entered the casino to report for work, Kelly was standing approximately one foot from Maritas. Another time, Maritas approached her. She described the effect of the surveillance:

> I was very uncomfortable because I was talking to [Maritas], looking at my supervisor [Perez] over his shoulder, along with another supervisor, Mr. Wilson . . . . They were just standing there . . . . They were looking at me. They didn't acknowledge me in any other way . . . . I was very uncomfortable. There were other guards leaving and they were reluctant to stop also.

(Tr. 149.)

Maritas also testified that the surveillance had a significant impact on his attempts to speak to bargaining unit members. He reported that "most" of the security officers would decline to converse with him while he was stationed in that area. (Tr. 47.) He testified that employees told him that they could not speak with him because, "they're watching me, I'll be fired."[15] (Tr. 51.)

While the great majority of the Employer's surveillance activity was accomplished without any unpleasant interaction with Maritas, there was one lesser and one greater exception to this pattern of civility. The lesser incident occurred on the first day, when Pisko and other

[15] I admitted this testimony for the limited purpose of illustrating the reported impact of the surveillance on the affected bargaining unit members. There was absolutely no credible evidence to suggest that the Employer had any intention of firing employees for engaging in protected activity and nothing remotely like this took place.

supervisors demanded that Maritas move to a different area of the casino's property. When he declined to do so, the subject was dropped and the parties engaged in pleasant conversation on other topics. However, the second incident was considerably more troubling. During that event, Pisko and Kelly confronted Maritas. Pisko, who had been angered by the content of a flyer written by Maritas, berated him in a loud manner. The two men had a shouting match that was witnessed by approximately six bargaining unit members.

The Board's leading case regarding employer surveillance of handbilling activities is *Arrow Automotive Industries,* 258 NLRB 860 (1981), enf. 679 F.2d 875 (4th Cir. 1982). In *Arrow*, the union engaged in handbilling on three occasions just outside the plant's three gates. On two of those occasions, the employer responded by having a total of eleven supervisors positioned near the gates so as to observe employees as they drove past the handbillers. The Board began its discussion by noting that there is nothing improper in management officials observing union activity that is conducted in public and on company premises so long as the surveillance is not out of the ordinary. On the facts presented, the Board found that the supervisors' behavior was "highly unusual" and was deliberately intended to demonstrate observation in force. 258 NLRB at 860. As a result, it was found to violate Section 8(a)(1) of the Act.

Over the years, the Board has amplified the standards for assessment of surveillance. For example, in *Eddyleon Chocolate Co.,* 301 NLRB 887 (1991), the employer drove his car to within fifteen feet of the union representative and watched employees as they were handed literature. He remained during the entire handbilling and, as he watched, he spoke into his car phone. The Board found this behavior to be "well out of the ordinary" and unlawful. Infra. [Internal quotation marks omitted.]

Similarly, in *Sands Hotel & Casino*, 306 NLRB 172 (1992), enf. 993 F.2d 913 (D.C. Cir. 1993), the Board found surveillance activity that consisted of the posting of a guard with binoculars to be unlawful since it was "more than ordinary or casual observation of public union activity," and there was no evidence that it was based on concern for safety or property rights. 306 NLRB at 172. In particular, the Board noted that "there was no evidence that the Respondent had any reasonable expectation of violence or of damage to its property." 306 NLRB 172, fn. 6.

In *Kenworth Truck Co.,* 327 NLRB 497, 501 (1999), the Board affirmed the administrative law judge's conclusion that the employer had engaged in unlawful surveillance because its activity had gone "beyond casual" and had become "unduly intrusive." In that case, the employer's human relations manager had stationed himself "near the plant gate in close proximity to the handbillers" and remained present until the handbillers left. He loudly accused the handbillers of trespassing and, in a threatening manner, ordered them to leave the premises. As a result, the judge concluded that, "[h]is conduct was coercive in that it patently tended to discourage employees from either joining the distribution effort or receiving the tendered literature." 327 NLRB at 501. [Footnote omitted.]

Recently, the Board has issued a decision that speaks very directly to the circumstances of this case in several key respects. In *PartyLite Worldwide, Inc.,* 344 NLRB 1342 (2005), the union lost a very close election. It sought a new election based on the employer's surveillance activities. Those activities had consisted of three incidents during which eight managers and supervisors were distributed among the six entrances to the employee parking lot for a period of fifteen minutes during handbilling by the union's agents. The Board directed a new election, finding that the surveillance was out of the ordinary. The majority noted that the employer failed to present any legitimate explanation for the surveillance. It also "emphasize[d]" that the

supervisors stationed themselves "close" to the handbillers. Supra at 1342. Interestingly, the dissenting board member argued that a new election was not warranted since the supervisors did not attempt to interfere with the distribution of the literature or yell at the handbillers, but merely stood and observed.

In comparing the Employer's conduct in this case with the Board's precedents, I also note some pertinent observations made by the Board just one month after its decision in *PartyLite.* In *Aladdin Gaming, LLC,* 345 NLRB 585, 586 (2005), it observed that, in regard to employer surveillance,

> [i]ndicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation.

Finally, the Board has just had occasion to address an employer's surveillance of organizing activity in *Sprain Brook Manor Nursing Home,* 351 NLRB No. 75, slip op. at 2 (2007). In that case, during shift changes, a union organizer would meet with employees at or adjacent to the facility's parking lot. On one occasion, the nursing home's administrator came in to work on her day off in order to observe these organizing activities. She stationed herself at the door of the building that was closest to where the employees were standing and watched them throughout the meeting. The Board concluded that her behavior was unlawful since,

> [the administrator's] presence at the facility was unusual because she did not ordinarily work on Saturdays. Employees testified that they had never seen her at the facility on a Saturday. On this day, employees saw her standing in the doorway and watching their union activities. By her own testimony, [she] was at the facility solely for the purpose of observing union activity. Under these circumstances, [her] conduct was "out of the ordinary" and constituted unlawful surveillance. [Citations, including one to *Partylite Worldwide*, omitted.]

In examining all of the circumstances involved in the Employer's surveillance activities in the present case, I conclude that it was objectionable conduct that would reasonably be expected to have a coercive impact on employees who were subjected to it. I base this conclusion on analysis of all of the factors cited by the Board in its line of surveillance cases.

Beginning with *Aladdin Gaming's* indicia of coerciveness, it is significant that all three clearly exist here. The duration of the observation was continuous. On virtually every occasion when Maritas presented himself at the employees' entrance, management responded by providing ongoing observation by one or more supervisors. That pattern of constant observation was conducted at very close quarters in a confined space. Apart from the clear and uncontradicted testimony of Maritas and Tenuto, the closeness was well illustrated by the fact that Maritas was able to overhear radio chatter by Perez. It was also corroborated by the photographs and maps presented by both sides. Lastly, the employer did engage in other coercive behavior during the surveillance. One example of such behavior was the unconcealed use of the radio to describe the handbilling activity. This conduct would have the same coercive impact as the use of the car telephone in *Eddyleon Chocolate*, supra. Beyond this, the Employer's supervisors twice engaged in confrontations with Maritas. While the first was brief and civil, the second was more prolonged, angry, and intimidating. It resembled the threatening

conduct discussed in *Kenworth Truck Co.,* supra, and was witnessed by a significant number of bargaining unit members. Thus, all of the *Aladdin* factors support a finding of objectionable conduct.

Beyond this, I conclude that the Employer's conduct here was out of the ordinary and unsupported by any legitimate explanation. It is obvious that the observations in this case were not obtained during any routine and preexisting pattern of surveillance of the employer's premises. To the contrary, as in *Sprain Brook Manor*, the record was clear in establishing that the surveillance was instituted in direct response to the organizing activity and for the sole purpose of observing that activity. Pisko confirmed that the Employer never attempted to present an explanation for this new surveillance activity to the members of the bargaining unit. Nor did the Employer explain why this new work assignment was given to each and every supervisor and manager in the security department and not to any of the actual security officers.

The Employer did attempt to provide an explanation for the surveillance to me. It was entirely unpersuasive. Pisko and Kelly both reported that Pisko's stated purpose for the surveillance was, "in case I needed a witness for any further litigation."[16] (Tr. 101.) There has never been any contention that the Employer feared any violence, damage to property, or interference with access to the entranceway.[17] The only stated concerns were Maritas' trespassing and his solicitation of employees in violation of the casino's no-solicitation policy. These supposed concerns are simply makeweights.[18] Pisko readily conceded that the casino had chosen to tolerate both Maritas' activities and his chosen location for conducting them. Indeed, in his posthearing brief, counsel for the Company has provided a clear explanation of the Employer's thinking. As he put it,

> Maritas' activities by the employee entrance all occurred on Company property. There is no contrary evidence. Maritas' activities by the employee entrance all occurred in an area where the Company has prohibited non-employee solicitation. Again, there is no contrary evidence. Moreover, the Company told Maritas where his activities would be permitted, and told him that if he refused to comply, he "would have company." Despite the Company's attempts to accommodate Maritas, and fair warning of the consequences if he did not comply, he brought the Company's response upon himself.

(Emp. Br., at pp. 10-11.) As this makes apparent, the Employer elected to tolerate Maritas' presence on its property and his activities while there. It decided that the appropriate response (or "accommodation" as counsel terms it) was to engage in close and continuous surveillance.

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[16] One cannot help but note the irony in the fact that the only litigation that ensued was largely based on the impropriety of the surveillance itself.

[17] Indeed, it would hardly be likely that Maritas would try to win over the security officers by engaging in unlawful activity directed toward the very premises that the bargaining unit members were professionally obligated to protect.

[18] I agree with counsel for the Union's observation that, "in reality the Employer assigned its supervisors to watch Mr. Maritas not to witness trespass but rather to observe his interactions with the unit employees. After all, the police were never called, no criminal charges were ever sought, no notes or other recordings were made, and Mr. Maritas was asked only once to leave the premises, on the first day. He was not asked again during the dozen or so subsequent visits." (Pet. Br., fn. 3.)

It may well be that, from the Employer's perspective, this was an appropriate response to Maritas. The difficulty here, however, is that it cannot be seen as a reasonable or lawful pattern of conduct vis-à-vis its own employees. The Act does not exist merely to protect the rights of union organizers. First and foremost, it is intended to protect the "free choice" of employees on the important question of whether they will decide to obtain representation of their interests by a union. *General Shoe Corp.,* supra. It is the impact on those employees that renders the Employer's chosen response to Maritas' challenge objectionable. For this reason, I cannot find the Employer's explanation to be reasonable, legitimate, or sufficient. In sum, I find that by engaging in close, intrusive, continuous surveillance marked, as well, by occasional interference, the Employer conveyed a clear and unmistakably coercive message to the members of the bargaining unit. The Union's objection to this conduct must be sustained.

2. Kelly's comments to bargaining unit members

Security Shift Manager Kelly engaged in a series of conversations with his employees on the day before the election. The Union contends that the content of his discussions was objectionable because it "promised to grant improved wages and other employment benefits if employees [voted] against the Petitioner." (Bd. Exh. 1(d), Objection 2.)

It is noteworthy that there is little dispute as to what Kelly told the bargaining unit employees. Tenuto reported that he told her, "that he felt that if we did not vote for the Union, that [the Employer] would look favorably on our department." (Tr. 150-151.)

Kelly provided a forthright and detailed account of his activities and statements on the day preceding the vote. He testified that he, "was hitting all the guards on the last night before the election." (Tr. 196.) His final conversation was with Tenuto. As he described it,

> I said to her, you know, it would make the security department look good with a no vote, that the dealers just voted four to one for the UAW, and it would put Ron [Pisko] in good light on the fifth floor and [Company President Mark Giannantonio] in good light with Columbia Sussex.

(Tr. 197.) He elaborated, testifying that, "I said the fifth floor, meaning our executives right there at the Tropicana will look favorable upon the security department and Ron Pisko, if we won the election." (Tr. 198.) When asked if he made the same sort of assertions to other bargaining unit members, he replied, "[s]ure." (Tr. 202.)

The Union contends that Kelly's statements constituted an objectionable promise of benefits if the bargaining unit voted against representation by the Union. In *E.L.C. Electric,* 344 NLRB 1200, 1201 (2005), the Board noted that it,

> will infer that benefits granted or promised during the "critical period" prior to a representation election interfere with the employees' free choice. . . . As the Supreme Court has aptly put it, "Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409 (1964).

In that case, the employer told unit members that it was actively seeking to improve its health

insurance benefits, but it made no specific promises. Nevertheless, the Board found the statement to be objectionable.

In this case, I must consider the fact that, in addition to making no specific commitments, Kelly did not even raise any particular topics. Instead, he merely opined that management would obtain a favorable opinion of the security department in the event of a vote against the Union. Standing alone, this would present a close question. In *E.L.C. Electric,* supra, at 1201, the Board observed that, "[t]o be objectionable and unlawful, a promise of benefits need not be explicit." [Citation omitted.] Furthermore, in *DynCorp,* 343 NLRB 1197, 1198 (2004), the Board held that the use of cautious, noncommittal language could still be objectionable even if the benefits promised were not "identified precisely." On the other hand, counsel for the Employer correctly cites a number of other Board precedents that declined to find vague statements unconnected to particularized areas of employees' concern to be objectionable or unlawful. See, for example, *Hyatt Hotels*, 296 NLRB 259, 269 (1989) (nebulous statements unconnected to any specific improvements are not unlawful) and *Noah's New York Bagels, Inc.,* 324 NLRB 266, 267 (1997) (generalized expressions that do not make any specific promise about any particular matter are permissible).

Had Kelly confined his comments to a general suggestion that a vote against the Union would favorably impress management, I would have to parse the Board's precedents in order to determine the proper characterization of this type of electioneering. Because Kelly chose not to so confine his remarks, it is not necessary to undertake that analysis. Instead, Kelly resorted to the ancient tactic of "divide and conquer." This Employer is a large organization hiring literally thousands of people in a variety of different occupations. Taking account of this, Kelly amplified his remarks by drawing invidious distinctions among those occupational groups based on their affiliation or lack of affiliation with labor organizations. Thus, he told unit members that their vote against representation would make them look good in light of the casino dealers' recent vote in favor of such representation. In my view, this crossed the line and was both unlawful and objectionable. Among the core provisions of the Act is the prohibition against employer discrimination based on the protected activities of its employees. See Section 8(a)(3) of the Act. The clear import of Kelly's comments was that the Employer would view unrepresented employees in a favorable light when compared to its opinion of other employees who had chosen representation.

I find Kelly's tactics to be analogous to the situation described in *Park Associates, Inc.,* 334 NLRB 328, fn. 2 (2001). In that case, during the critical period before a decertification election, the employer posted a wage and benefit summary that drew distinctions between the conditions of employment of its represented and unrepresented employees and implied the possibility of higher raises if the represented employees voted against continued representation. The Board found this conduct to be unlawful. In my view, the suggestion that a vote against the Union would raise the status of a group of employees above that of another group that had chosen representation was both a veiled promise and a sly threat that the Employer would engage in the type of discrimination clearly outlawed by the Act. As such, it was objectionable conduct.

3. The Employer's disparaging flyer

During the campaign leading to this election, both sides produced a variety of propaganda literature. Not unexpectedly, some of this was rather intemperate and even nasty. As the Board has noted, "[a] certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election." *Cal-West Periodicals,* 330 NLRB 599, 600 (2000), citing *Nabisco, Inc. v. NLRB,* 738 F.2d 955, 957 (8th Cir. 1984). Nevertheless, the

Union contends that one particular piece of campaign literature written by Pisko was objectionable because it "accus[ed] one of Petitioner's representatives of engaging in criminal behavior, to wit, that he was a 'forger.'" (Bd. Exh. 1(d), Objection 7.) In addition, in its posthearing brief, the Union adds a further contention that this flyer contained statements "implying futility" and constituting "a direct or indirect threat not to engage in good faith bargaining if the union is elected." (Pet. Br., p. 6.)

The flyer at issue was written by Pisko on October 8. It was precipitated by a piece of union propaganda issued by Maritas. Maritas had chosen to write a memorandum in the style used by Pisko in earlier communications from management to the bargaining unit members. It purported to be a post election memo from Pisko apologizing for his inability to keep his promises to the employees and announcing a broad range of negative changes to their terms and conditions of employment.

In his response to Maritas' salvo, Pisko chose to characterize it as a "forgery" that "contained one lie after another." (Pet. Exh. 1.) Indeed, Pisko cited this as evidence that Maritas was unworthy of trust and support because, "he must rely on lies and forgery." (Pet. Exh. 1.) As a result, Pisko told the unit members that, "[n]o one at the casino will ever trust the union or this individual [Maritas]." (Pet. Exh. 1.) He concluded with the exhortation to, "**vote no against lies & forgery**." (Pet. Exh. 1.) [Boldface and underlining in the original.]

The Board's standards for assessment of this sort of election commentary are quite clear. First and foremost, after a period of controversy on the issue, the Board held that,

> we rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements.

Midland National Life Insurance Co., 263 NLRB 127, 133 (1982). See also *Albertsons, Inc.,* 344 NLRB 1357, 1360 (2005).

With this in mind, I turn to the Employer's accusation that Maritas had crafted a forged document that was full of lies. It is obvious to me that this charge is completely unfounded.[19] I have already noted that Maritas' flyer contained a boldface disclaimer specifically stating that it had been prepared by the Union, "**and not by Ron Pisko**." (Emp. Exh. 1.) [Boldface in the original.] Beyond that, it was written in an obvious tongue-in-cheek manner that completely belies any intent to mislead its readers. No reasonable bargaining unit member would be misled into thinking that the Employer had actually written a preelection communication to them that purported to inform them that they were about to lose all of their sick leave and vacation time and that their ranks would be decimated by a layoff that was going to be conducted exclusively based on "favoritism." (Emp. Exh. 1.) Thus, I certainly agree with the Union that the Employer's claim that Maritas had engaged in forgery and lying was patently false and disparaging.

While the Employer's flyer was untrue and misleading, it was not unlawful. The test was described by the Board in *Salvation Army Residence,* 293 NLRB 944 (1989), enf. 923 F.2d 846

[19] I recognize it appears that I am contradicting the Board's injunction not to probe into the truth of the statements. In this instance, the answer is so clear from the face of the two documents at issue that no probing is required. As a result, I feel free to state my conclusion.

(2d Cir. 1990). In that case, the employer's administrator, "told the unit employees that the Union belonged to the Mafia." In rejecting the claim that this statement violated the Act, the Board held,

> we find that the Respondent's comment about the Union was protected by Section 8(c) of the Act and is similar to certain statements that the Board has found to be "privileged expressions of opinions, which, however false or unsubstantiated, did not rise to the level of interference, restraint, or coercion prohibited by Section 8(a)(1) of the Act." [Footnote omitted.]

Similarly, a supervisor's comment that a union might send someone to break employees' legs if they failed to pay their dues was characterized by the Board as "flip and intemperate," but nevertheless, "only expressions of his personal opinion protected by the free speech provisions of Section 8 of the Act." *Sears, Roebuck & Co.,* 305 NLRB 193, 194 (1991). Recently, the Board has underscored that the key question is whether the disparaging remarks convey any explicit or implicit threat or suggest that employees' protected activities were futile. If they do not, then they are permissible commentary. *Rogers Electric, Inc.,* 346 NLRB 508 (2006).

It is clear that Pisko's memorandum does not contain any improper threats or promises. The entire thrust of the document is that unit members should reject the Union because of the character of its campaign, not because of any promise or threat made by the Employer. Counsel for the Union contends, however, that the flyer does contain a statement that suggests that a vote for the Union would be an exercise in futility. He contends that Pisko's comment that nobody in management will ever trust Maritas or the Union sends a message that the Employer will refuse to bargain in good faith.

I think counsel makes too much of Pisko's remark. It is too great a stretch to conclude that the Employer will refuse to bargain in good faith merely because it lacks trust in the Union or its representative. I see no reason why the bargaining unit members would have any difficulty understanding that parties to important negotiations often lack trust in one another. Yet, human experience provides a great many examples of fruitful negotiations between wary adversaries in such disparate fields as foreign policy, domestic relations mediation, corporate mergers, and labor relations.[20] I find this situation to be similar to that presented in *Trailmobile Trailer, LLC,* 343 NLRB 95 (2004), where a manager told an employee that the union was using him and that the union's representative was "worthless and no good." The Board found that, while the comments were disparaging, they "did not suggest that the employees' union activity was futile." Infra.

I have carefully considered the entire contents of Pisko's flyer and conclude that it did not contain any suggestion of futility or hint of threat or promise. While certainly disparaging, it constituted unobjectionable campaign propaganda that did not interfere with the unit employees' freedom of choice.

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[20] A good example of the point I am making was President Ronald Reagan's famous comment at the signing of the Intermediate Range Nuclear Forces Treaty with the Soviet Union in 1987. He opined that it was necessary to, "Trust, but Verify." Of course, in reality, this was his oblique way of stating that he did not trust his adversary. Had he really trusted the Soviets, verification would have been unnecessary. The lack of trust, while undoubtedly mutual, did not preclude the parties from reaching their important arms control agreement.

4. Other statements allegedly made by the Employer

The Union's two remaining specific objections concern statements allegedly made by management officials that "threatened employees with loss of sick leave and vacation benefits if they voted for the Petitioner," and "sought to intimidate employees by making a point of informing certain employees that they were aware that they were supporters of the Petitioner." (Bd. Exh. 1(d), Objections 1 and 4.) In both instances, these assertions are based entirely on the uncorroborated testimony of Tenuto. In addition, in its brief, the Union has cited additional alleged comments by the Employer in support of its general contention that the Employer "destroyed the conditions necessary for a fair election." (Bd. Exh. 1(d), Objection 8.) These contentions are that management officials told unit members that if they chose representation, the Union would still "have no control over the scheduling" of employees' work and that negotiations "would start at nothing." (Pet. Br., p. 7.) Once again, these allegations are based entirely on Tenuto's testimony.

As to the first of these objections, it will be recalled that Tenuto did not testify that management representatives actually threatened unit members with the loss of sick leave and vacation benefits. Rather, she reported that during a roll call meeting another unit member, Walters, made this claim in the presence of Pisko and Perez. She contends that Pisko and Perez failed to dispute that employee's assertions. By contrast, Pisko and Perez testified that they never heard any discussion of benefits along the lines reported by Tenuto. They reported that the only roll call conversations about benefits occurred during presentations by the human resources spokesperson, Tartaglio. Tartaglio's testimony provided some measure of corroboration.

I have already noted that I found Tenuto's testimony to be marked by vagueness and imprecision to the extent that I am reluctant to place heavy reliance on it. By contrast, Pisko and Perez were clear and consistent in their accounts. From this, I conclude that the Union has failed to carry the burden of establishing that Walters made the statement attributed to her by Tenuto or that Pisko and Perez heard it. For this reason, I conclude that Objection 1 must be overruled.

Objection 4 refers to the conversation between Perez and Tenuto that followed on the heels of a rather unpleasant roll call exchange between Walters and Tenuto. Tenuto contends that Perez informed her that she was aware that Tenuto represented the "face of the Union." (Tr. 151.) Perez confirmed that the conversation occurred and that the phrase, "face of the Union," was uttered. She reported that it was Tenuto who first used this language, asking Perez why she had "become the face of the Union." (Tr. 205.) Both witnesses agree that the context for their conversation was an effort by Perez to reassure Tenuto after the unpleasantness at the roll call. Based on my assessment of both witnesses' overall reliability and the logical inferences to be drawn from the undisputed context, I have concluded that Perez did not bring up this topic, nor did her subsequent discussion of it involve any express or implied threats. To the contrary, it represented an attempt to reassure Tenuto. Nothing that was said during their discussion was objectionable or unlawful. In consequence, I find that Objection 4 should be overruled.

As to the scheduling issue, Tenuto reported that during a roll call Perez told the unit members that even if they chose the Union as their representative, the Union would have no control over the employees' work schedules. Perez, Pisko, and Kelly all testified that no such statements were made by any management officials. They reported that management did refer the unit employees to a collective-bargaining agreement between the Union and a casino in Nevada. That agreement appeared to cede effective control of scheduling to the employer.

The Company submitted a copy of that agreement in support of this testimony. Given the corroboration, coupled with the clear and consistent testimony of the supervisors, I do not find that Perez made the statement attributed to her by Tenuto. The Union has not met its burden of proof as to this claim and it is not credited.

Finally, Tenuto alleged that during several roll calls, "[w]e were told that if we went with the Union, negotiations would start with us having nothing. They wouldn't start from what we had presently." (Tr. 145.) She contended that this assertion was repeatedly made by Pisko, although she was unable to specify any dates on which he told the assembled officers that they would be in jeopardy of losing wages or benefits that they presently possessed.

Pisko testified that he did discuss the subject of wages and benefits in the event of a vote in favor of representation. He specifically denied making the type of statements attributed to him by Tenuto. Instead, he reported that he told the unit members that, "we started with a blank contract and everything was negotiable, and they could either stay the same, they could lose, or they could win." (Tr. 183.)

As with several other issues, I must resolve direct conflicts in testimony between Tenuto and Pisko. The differences between their two accounts of what Pisko said to the assembled officers are legally significant. Long ago, the Board outlined its standards for assessment of these types of campaign arguments from employers. In *Plastronics, Inc.,* 233 NLRB 155, 156 (1977), it held:

> Depending upon the surrounding circumstances, an employer which indicates that collective bargaining "begins from scratch" or "starts at zero" or "starts with a blank page" may or may not be engaging in objectionable conduct. . . . Such statements are objectionable when, in context, they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore. On the other hand, such statements are not objectionable when additional communication to the employees dispels any implication that wages and/or benefits will be reduced during the course of bargaining and establishes that any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining. . . . The totality of all the circumstances must be viewed to determine the effect of the statements on the employees. [Citations and footnote omitted.]

Applying these standards, the Board found that an employer's statement that wages would revert to a minimum and could ultimately end up higher, lower, or the same was unlawful because it could reasonably be viewed as an assertion that "wages would revert to a minimum at least until negotiations were concluded." *Noah's New York Bagels,* 324 NLRB 266, 267 (1997). By contrast, the Board declined to find a statement that, "in collective bargaining you could lose what you have now," to be improper. *Wild Oats Markets,* 344 NLRB No. 86 (2005), slip op. at p. 1. The key distinction was that this statement was not "susceptible to the interpretation that the employer intended to discontinue existing benefits prior to bargaining." Infra., slip op. at p. 1.

Under Tenuto's version of Pisko's statements, the issue would be in genuine doubt because the officers were supposedly told that, "negotiations would start with us having

nothing." (Tr. 145.) It could be concluded that this implied that the employer may reduce existing benefits prior to entering into bargaining with the Union. It is not necessary to parse this further because I do not accept Tenuto's version. Instead, I credit Pisko's testimony because a comparison of the overall accounts of the two witnesses convinced me that he was a clearer and more precise informant. Beyond that, I have heeded the Board's admonition to consider the context. In particular, I have compared Pisko's alleged comments on this issue with the Company's written statements on the same topic.

In a memo to bargaining unit members on September 20, Pisko discussed the subject of "wage increases." (Emp. Exh. 9, p. 9.) He told them that the Union would only be able to deliver "what the Company agrees to at the bargaining table," adding that the Company would be "completely free to propose that your wages and benefits increase, decrease or stay the same." (Emp. Exh. 9, p. 9.) Similarly, in another memo dated October 5, Pisko advised unit members that, "in collective bargaining it is possible that you could lose benefits that you now have because everything is negotiable." (Emp. Exh. 9, p. 21.) Finally, in his memo of October 6, Pisko addressed the topic using his question-and-answer format. He posed the question as follows:

> QUESTION: Doesn't getting a union always mean a raise in pay and benefits?
>
> ANSWER: No. Everything is subject to negotiation. The Casino would not be obligated to agree to continue any existing wage level or benefit you now have. All your work related benefits would be subject to negotiation. You might lose more than you gain or vice versa, or break even.

(Emp. Exh. 9, pp. 22-23.)

Taken together, I conclude that these statements are consistent with the version of Pisko's roll call remarks described in his testimony.

Because I have placed greater reliance on Pisko's clear and detailed account that is supported by its consistency with the documentary evidence, I do not find that the Union has met its burden of proving that Pisko made the more likely objectionable version of his remarks as alleged by Tenuto. I also find that the remarks that Pisko did make contained a sufficient link to the give-and-take of the negotiating process to pass muster. In other words, I do not find that a reasonable listener would conclude from his remarks, taken in context, that the Employer might unilaterally reduce existing wages or benefits at any point prior to the signing of a collective-bargaining agreement with the Union. As a result, Pisko's discussion of the status of wages and benefits did not improperly interfere with the conditions necessary for a fair election.

Conclusions and Recommendation

The Union has contended that the Employer engaged in six forms of objectionable conduct that destroyed the laboratory conditions fundamentally necessary for an uncoerced representation election. After assessing all of the evidence, I have concluded that two of the Union's objections are meritorious. First and foremost, the Employer engaged in an extensive pattern of close surveillance of the Union's handbilling and solicitation activities, a course of conduct that also included actual interference with those efforts. Second, immediately prior to the day of the election, a supervisor of bargaining unit employees told several of the potential

voters that, if the vote resulted in rejection of the Union, management would then look favorably on the security department's personnel. This observation was made in the context of a reference that drew a contrast between that desirable outcome and the results of a recent victory by another union seeking to represent a different set of casino employees.

Having determined that the Employer has engaged in these forms of objectionable conduct, I must assess the proper response required under the Act. In making this analysis, I am guided by a detailed set of considerations enumerated by the Board. It has listed the following factors:

> (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. [Citation omitted.]

Taylor Wharton Division, 336 NLRB 157, 158 (2001). I will address each of these in turn in order to determine whether a new election is required.

With regard to the number of incidents of objectionable behavior, it is noteworthy that both types of established misconduct were part of a repetitive pattern. It is undisputed that the employer engaged in the practice of close surveillance on virtually every occasion that Maritas chose to solicit bargaining unit members entering or leaving through the employees' doorway. Similarly, Kelly testified that he campaigned among all the members of his security shift on the day before the election and conceded that he made his objectionable observations to multiple officers. As a result, this factor argues in favor of the relief being sought.

The second factor requires analysis of the degree of intimidation inherent in the misconduct. As discussed earlier in this decision, the Board has taken specific note of certain aspects of employer surveillance that tend to increase the coercive nature of that conduct. Those aspects are present in this case, particularly the close nature of the observations and the obvious use of radio communications. In addition, I note that all of the security department's supervisors participated in the surveillance at one time or another and that the surveillance was often undertaken by more than one supervisor at a time. Finally, the intimidation likely to have been aroused by the Employer's conduct was enhanced when Pisko chose to engage in an angry confrontation with Maritas during the course of the surveillance, an encounter that was witnessed by a significant number of unit members. In addition, I have noted that Kelly's remarks were rendered more coercive because he chose to make an invidious comparison between groups of employees premised on their expressed desires regarding union representation. Based on these factors, I conclude that this consideration also argues in favor of a new election.

The third factor involves the number of employees subjected to the misconduct. The uncontroverted evidence established that most of the employees came and went from their jobs through the doorway involved in the Employer's surveillance. That improper activity occurred

during all of the work shifts and on a number of workdays. I find that it affected most, if not all, of the bargaining unit members. In addition, Kelly's objectionable remarks were made to multiple members of his shift and would have affected a significant body of potential voters. This factor also tends to support the need for a new election.

The factor of proximity to the time of the election clearly argues in favor of the need for relief. The surveillance was conducted during the two weeks immediately preceding the vote and Kelly's comments were made on the day before that vote. From this chronology and from the likely strong impact of the nature of the misconduct as just discussed above, I conclude that the next factor, the degree of persistence of the misconduct in the minds of the unit members, also supports the need for a new election. Similarly, the fact that the misconduct would have been experienced by, or well known to, virtually all of the bargaining unit members argues for the same result.

The Board's next factor requires consideration of any misconduct by the Union that could have served to equalize the playing field. The only conceivable instance of such activity that the Company viewed as improper was Maritas' memo attempting to imitate Pisko's writing style and format while showing the hypothetical results of a vote against the Union. Given the clear disclaimer and obvious hyperbole contained in that missive and the recognition that, "it is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations," I do not find that Maritas' composition was anything more than permissible campaign propaganda. *Trailmobile Trailer, LLC,* 343 NLRB 95 (2004). It was not misconduct at all.[21] As a result, this factor cannot provide any assistance to the Company's case.

The remaining two factors are particularly obvious in their application to this case. The closeness of the vote clearly supports the need for a new election as misconduct that created a significant coercive impact on even one voter could have been decisive. Lastly, the degree to which the misconduct can be attributed to the Employer is also clear. The decision to engage in a pattern of close and intimidating surveillance was made by the Employer's executive director of security and the objectionable statements were made by one of the security department shift managers. They are plainly attributable to the Company.

Having considered all nine of the factors outlined by the Board in *Taylor Wharton,* supra, I conclude that they all support the determination that a new election is required in order to assure that the bargaining unit members have an opportunity to express their desires in an atmosphere free of coercion by the Employer.[22] As a result, I recommend this form of relief. In

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[21] The fact that Maritas conducted his activities on the casino's property and in violation of its no-solicitation policy also does not constitute misconduct on the unique facts of this case because the Employer concedes that it made the decision to tolerate this choice of location by Maritas. In light of the Employer's choice, Maritas did nothing to flaunt the law, improperly confront the Employer, or interfere with its operations.

[22] As indicated, I have considered the misconduct by Kelly along with the Employer's surveillance. I note, however, that application of the holding in *PartyLite Worldwide*, supra., would require the recommendation of a new election regardless of the effect of Kelly's remarks. In that recent case, the only misconduct considered by the Board was employer surveillance. That surveillance took place on fewer occasions, for shorter periods of time, and without any claim of interference with the union's activities. It also involved a similar degree of close observations by multiple supervisors. In fact, in that case eight supervisors engaged in observations at a total of six entrances. This is entirely comparable to the ratio of supervisors to entrances in the instant case. I conclude that *PartyLite* would mandate the direction of a new

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addition, I will include the form of notice described in *Lufkin Rule Co.,* 147 NLRB 341 (1964) in order that unit members gain an understanding of the reasons for the new election.

In accordance with these findings and conclusions, I sustain the Union's Objections 2 and 5,[23] recommend that the results of the election held on October 10, 2007, be set aside, and issue the following recommended:[24]

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate whenever the Regional Director deems appropriate. The Notice of Second Election shall include the following language:

> The election conducted on October 10, 2007 was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.

The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations.

Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible voters are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union, Security, Police and Fire Professionals of America (SPFPA).

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear,*

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election based on the surveillance activity alone.

[23] I further recommend that the Union's Objections 1, 4, and 7 be overruled and that Objection 8 be sustained only on the basis of the conduct found objectionable in this decision.

[24] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, D.C., within 14 days from the date of issuance of this Report and Recommendations. Exceptions must be received by the Board in Washington by February 27, 2008.

156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility,* 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. February 13, 2008

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Paul Buxbaum
Administrative Law Judge